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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

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PARKER MALMSTROM and CRYSTAL  
MALMSTROM,

Plaintiffs,

v.

STATE OF UTAH DEPARTMENT OF  
CHILDREN AND FAMILIES, et al.,

Defendants.

**MEMORANDUM DECISION AND  
ORDER ADOPTING [105] REPORT  
AND RECOMMENDATION**

Case No. 1:17-cv-80-DN-EJF

District Judge David Nuffer

Magistrate Judge Evelyn J. Furse

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The Report and Recommendation<sup>1</sup> issued by United States Magistrate Judge Evelyn J. Furse on January 16, 2018 recommends<sup>2</sup> that Plaintiff Parker Malmstrom's ("Plaintiff") claims<sup>3</sup> against Defendant William Nebeker ("Defendant") be dismissed without prejudice for lack of personal and subject matter jurisdiction. On Tuesday, January 30, 2018, Plaintiffs Parker Malmstrom and Crystal Malmstrom timely filed a nearly unintelligible document entitled "Objection to Magistrate's Decision and Order Or Motion to Set Aside Magistrate's [sic]."<sup>4</sup> It attached a law review article.

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<sup>1</sup> Report and Recommendation: William Nebeker's Motion to Dismiss (ECF No. 35), [docket no. 105](#), filed January 16, 2017.

<sup>2</sup> *Id.* at 8.

<sup>3</sup> Pro se Plaintiff Parker Malmstrom filed his Complaint on May 16, 2017. *See* Complaint, [docket no. 1](#), filed May 17, 2017. He then filed an Amended Complaint on May 16, 2017. *See* Amended Complaint, [docket no. 3](#), filed May 23, 2017. The Amended Complaint joined his mother, Crystal Malmstrom, as a Plaintiff. *See Id.* At Oral Argument, Crystal Malmstrom clarified that she is only bringing claims against Defendant Jacob Smith. *See* Minute Order, Proceedings held before Magistrate Judge Evelyn J. Furse: Motion Hearing, docket no. 88, filed September 12, 2017. Because of this clarification, the Report and Recommendation only address Parker Malmstrom's claims against William Nebeker.

<sup>4</sup> [Docket no. 107](#), filed January 30, 2018.

De novo review has been completed of those portions of the report, proposed findings and recommendations to which objection was made, including the record that was before the Magistrate Judge and the reasoning set forth in the Report and Recommendation.<sup>5</sup>

Although styled as an objection, Plaintiffs' filing is not sufficient. It is entirely unresponsive to the issues of personal and subject matter jurisdiction raised in the Report and Recommendations. Defendant argued in his motion to dismiss that the Court does not have personal jurisdiction over him because of Plaintiffs' insufficient service of process.<sup>6</sup> "In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant."<sup>7</sup> When a defendant challenges service of process, a plaintiff has the burden to show that service was proper.<sup>8</sup> Plaintiff did not allege in his memorandum opposing Defendant's motion<sup>9</sup> or the objection to the Report and Recommendation<sup>10</sup> that Defendant was properly served under [Fed. R. Civ. P. 4](#). Plaintiff therefore has failed to carry his burden to show that service on Defendant was proper.

Additionally, "Courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."<sup>11</sup> The Report and Recommendation fulfilled this obligation and Plaintiff failed to respond in any meaningful way to the determination that subject matter jurisdiction is lacking. The analysis and conclusion of the

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<sup>5</sup> 28 U.S.C. § 636(b).

<sup>6</sup> Rule 12(b) Motion at 2, [docket no. 35](#), filed June 15, 2017.

<sup>7</sup> *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

<sup>8</sup> See *Fed. Deposit Ins. Corp v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir. 1992).

<sup>9</sup> Plaintiffs' Response to Defendant William Nebeker Dkt Entry 35, [docket no. 80](#), filed September 1, 2017.

<sup>10</sup> Objection to Magistrate's Decision and Order Or Motion to Set Aside Magistrate's [sic], [Docket no. 107](#), filed January 30, 2018.

<sup>11</sup> *Id.*

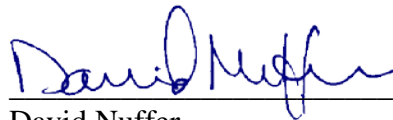
Magistrate Judge are correct. Therefore, the analysis and conclusion of the Magistrate Judge are accepted and the Report and Recommendation<sup>12</sup> is adopted.

**ORDER**

IT IS HEREBY ORDERED that the Report and Recommendation<sup>13</sup> is ADOPTED and the Defendant William Nebeker's Motion to Dismiss<sup>14</sup> is GRANTED. Plaintiff Parker Malmstrom's claims against Defendant William Nebeker are dismissed without prejudice for lack of personal and subject matter jurisdiction.

Signed February 7, 2018.

BY THE COURT



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David Nuffer  
United States District Judge

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<sup>12</sup> Report and Recommendation: William Nebeker's Motion to Dismiss (ECF No. 35), [docket no. 105](#), filed January 16, 2017.

<sup>13</sup> Report and Recommendation: William Nebeker's Motion to Dismiss (ECF No. 35), [docket no. 105](#), filed January 16, 2017.

<sup>14</sup> Rule 12(b) Motion, [docket no. 35](#), filed June 15, 2017.